

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1484

To be argued by
A. Raymond Randolph, Jr.
or N. Richard Janis

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

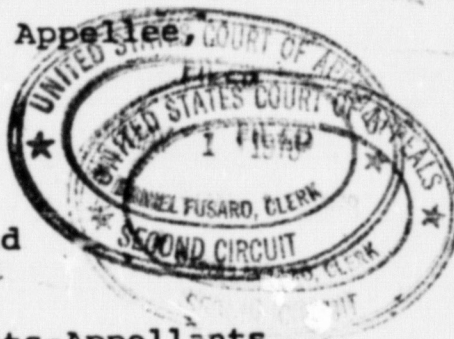
Docket No. 77-1484

UNITED STATES OF AMERICA,

v.

ARNOLD NELSON MAHLER and
DEAN H. UBBEN,

Defendants-Appellants



ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT ARNOLD NELSON MAHLER

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Introduction

In a lengthy^{1/} and often strident brief, the government has urged this Court to affirm the conviction of appellant Arnold Nelson Mahler. Since we believe that the government's brief is replete with misstatements and mischaracterizations

^{1/} The government's brief exceeds by 30 printed pages the normal limit prescribed in the Federal Rules of Appellate Procedure (Rule 28 (g)). The bulk of that brief is addressed to the arguments raised by appellant Mahler.

of fact and law, we find it necessary to file this short Reply Brief.^{2/}

Statement of Facts

Indicative of the root of the problem with the "Statement of Facts" in the government's brief is its complaint at p. 22 n. *, that the statement of the government's case in appellant Mahler's brief "bears not the slightest resemblance to the Government's proof taken most favorably to the Government (as it must be on this appeal)" (emphasis added). No cases are cited to support this assertion^{3/} and we are aware of none that could be. Apparently, the government has confused the unique standard of review a reviewing court applies when deciding claims of insufficiency of the evidence (a point not raised by either appellant in the instant case) with the standard to be applied by counsel in summarizing all the evidence adduced at trial. As a result, the government's "Statement of Facts" is one-sided and replete with its conclusions and deductions regarding the evidence, almost always without references to the portion of the transcript upon which particular conclusions and deductions

^{2/} We regret that we were unable to have this Reply Brief prepared in printed form, but since we did not receive the proofs of appellee's brief until April 26, 1978, six days after it was filed, we had insufficient time to do so.

^{3/} The government repeats this assertion in its Motion for Permission to File Oversize Brief (Affidavit of Jed S. Rakoff at ¶6).

are based.^{4/}

Thus, the government has seen fit to suggest that actions were taken at the behest of Mahler, even though the government's witnesses never so testified, or testified to the contrary. For example, the government refers to a meeting at a downtown Manhattan restaurant arranged by "the swindlers" to tout the stock (Government's Brief at 13). Although the implication is that Mahler is being referred to, the testimony of the government's witnesses at trial revealed that Mr. Mahler did not arrange, was not present at and did not participate in the meeting (in fact, it was arranged by Mr. Kulekofsky),^{5/} nor did he have anything to do with the preparation of the presentation made at the meeting (e.g. Tr. II 233, 717, 718). Similarly, the

4/ Instead, the government has at the end of each of the eight numbered sections of the "Statement of Facts," cited "references to some of the corresponding testimonial and exhibit evidence" (See Government's Brief at 5, second footnote).

In contrast, appellant Mahler's brief contains at the end of each sentence the transcript citations upon which each statement in the sentence was based. Moreover, appellant Mahler's statement of facts merely reports what the witnesses testified -- it does not interpret that testimony as the government has done in its "Statement of Facts."

5/ Kulekofsky was the government's first witness at each of the trials in this case, and his importance is highlighted by the grant of immunity the government gave him in order to obtain his testimony. Although any fair reading of the record amply reveals that Mr. Kulekofsky was the centrally-placed (and quite possibly the most culpable) figure of all the individuals actually involved in the Industries International fraud (see Brief of Appellant Mahler at 4-15), he is hardly mentioned in the government's brief. Presumably this reflects the government's sensitivity to Kulekofsky's admission on cross-examination that throughout the events in question, 90 percent or more of his conversations were with another government witness, Mr. Zucker, rather than with Mahler (Tr. II 248-249, 272).

government states that Mahler and Ubben arranged for the company (Industries International) to pay Kulekofsky and Wellens a bribe of 50,000 shares of restricted stock (Government's Brief at 12-13). However, Kulekofsky himself testified that Mahler had nothing to do with this arrangement (Tr. II 234, 241). In still another example, the government asserts that one stock broker, Michael Dutzar, was counseled by "the swindlers" to testify falsely before the SEC (Government's Brief at 20). Although, again, the implication is that Mahler is being referred to, Dutzar testified that he met with Kulekofsky and Zucker to concoct the story, that it was Kulekofsky who told him what to say, and that he had no contact with and received no counsel from Mahler (Tr. II 1287-1293).

The government also seriously misleads the Court by suggesting twice in its brief that it was solely because of the refusal of Mahler and Ubben to stipulate to an eleven-juror verdict that a mistrial of the first trial was declared (Government's Brief at 2, 40).^{6/} Although Mahler and Ubben did not agree to a jury of eleven (Tr. I 6633-6634), the prosecutor also refused to accept a jury of eleven, although a number of the other defendants announced their willingness to do so (Tr. I 6633-6635, 6642-6643).^{7/}

6/ See also Motion for Permission to File Oversize Brief (Affidavit of Jed S. Rakoff at ¶ 2).

7/ The prosecutor claimed that his refusal was based upon his unwillingness to have verdicts on only some, but not all, of the defendants (Tr. I 6643), but conceded that he could not "understand the verdict [three acquittals] brought in by the jury thus (footnote continued on page 5)

I. THE TRIAL COURT ERRED IN ADMITTING
EVIDENCE OF DEFENDANT MAHLER'S PRIOR
CONVICTIONS

- A. The Evidence Regarding Mr. Mahler's
Prior Convictions, Introduced by
the Government in its Direct Case,
Was So Complex, Confusing and Preju-
dicial that the Trial Court Should
Have Been Compelled to Exclude It.

The government apparently cannot answer our arguments except by misstating them. Contrary to the government's statements,^{8/} we do not contend that the court should have forbidden the use of all evidence of prior crimes on the issue of the defendant's knowledge. Rather our argument is that unnecessarily reading twenty pages of complicated testimony given by

7/ (continued from page 4)
far" and that "it leads me to believe that for better or worse we have not made a presentation to the jury that I should have" (Tr. I 6636). Judge Frankel commented that, in fact, the government wanted a "second crack" (Tr. I 6636) at all the defendants and then told the prosecutor:

Well, I will tell you that whatever small leeway there may be in considering motions for a judgment of acquittal after a mistrial has been declared will be employed with a view to the legitimate concerns of the three other defendants when such motion is made. And you may assume that. I don't know whether you're going to make a better presentation or not, but I don't think you are going to get a better jury, and I must say that I am not overpowered by the cogency or the justice of the position you take now that it has all been put out on the table.

But I don't believe that I have the power to order a unanimous verdict by 11 over the protests of the Government, and therefore it seems to me that I am compelled or would be compelled to declare a mistrial . . . (Tr. I 6636-6637.)

8/ Government's Brief at 25.

Mr. Mahler in an unrelated case, after the government had already introduced other evidence of prior similar acts for this purpose,^{9/} generated such confusion that it maximized the danger of prejudice that exists whenever evidence of other crimes is introduced -- that is, the danger the jury would be distracted from what actually happened on the particular occasion in question and would convict because the defendant is a "bad man."^{10/}

It is no answer to say, as the government does, that since the evidence was not irrelevant its admission was "not prejudicial at all."^{11/} This Court recently emphasized that the analysis of other crimes evidence involves two separate steps. First, the evidence must be relevant to some issue at trial other than "to prove the character of a person in order to show

^{9/} The government had already introduced two indictments, two judgments of conviction, and live testimony concerning two prior "shell deals" involving other companies not the subject of the indictment in this case. See Brief of Appellant Mahler at 4, 5 n. 8, and 32 n. 48.

^{10/} See Brief of Appellant Mahler at 29, 33-34. Defense counsel's attempt to prevent the reading of the twenty pages of testimony was not "an obvious ploy to handicap the jury" as the government alleges. See Brief for the United States of America at 30 n. *. It was a bona fide attempt to minimize the prejudicial effect of the other similar act evidence the government introduced. The government also ridicules Mr. Mahler's argument, labeling it a "generalized claim that this similar act proof overall, was in some unspecified way, 'prejudicial'" (Government's Brief at 31). But, the specific prejudice from other crimes evidence that has always been clear to the commentators and this Court is the possibility that the jury "will impermissibly infer that [the defendant] is a bad man likely to have committed the crime for which he is being tried." United States v. Benedetto, No. 77-1306 (2d Cir. February 24, 1978), slip op. at 1739.

^{11/} See Government's Brief at 36.

he acted in conformity therewith." Rule 404(b), Fed. Rules Evid. Second, "even if relevant," the trial court must ask "should the evidence nonetheless be excluded because 'its probative value is substantially diminished by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .,' as mandated by Fed. R. Evid. 403" United States v. Gubelman, No. 77-1279 (2d Cir. February 24, 1978), slip op. at 1750. While the evidence in question may have satisfied the first step, it fell far short on the second.

Although, as we predicted,^{12/} the government attempts to gloss over the bewildering array of names, dates and transactions presented to the jury in the twenty pages of testimony,^{13/} a reading of those pages (Tr. II 744-764) [A. 126-147] leads one inescapably to the conclusion that they should have been excluded.^{14/}

^{12/} See Brief of Appellant Mahler at 33.

^{13/} The government states that there were not "nearly so many [new names and dates] as Mahler's brief implies" (Government's Brief at 32). This is incorrect. All of the names, dates and transactions mentioned in Mr. Mahler's brief were drawn directly from the transcript read to the jury. See Brief of Appellant Mahler at 32-33. The government is also incorrect in its assertion that the portions redacted from the original transcript consisted entirely of Mr. Mahler's testimony (See Government's Brief at 30 and n. **). Most of the redacted matter consisted of statements of the court and counsel.

^{14/} The government attacks Mr. Mahler for failing to object to the evidence after Judge Pollack ordered some of the transcript redacted (See Government's Brief for United States at 32). Mr. Mahler had already had his objection to prior crimes evidence overruled four times and there was absolutely no reason to believe a fifth objection would be treated more favorably. See R. Docs 71, 73, 82; Oct. 6, 1977, Tr. 5; Tr. II 670. Compare United States v. Gubelman, *supra*, No. 77-1279 (2d Cir. February 24, 1978), slip op. at 1753 n. 13.

In light of the other similar acts evidence that the government had presented, the reading of the twenty pages of testimony was not reasonably necessary to the government's case.^{15/} As Mr. Justice Cardozo stated in Shepard v. United States, 290 U.S. 96, 104 (1933), "It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

The trial judge in this case should have heeded Mr. Justice Cardozo's advice and prohibited the unnecessary introduction of evidence so complicated that its only incremental value was in allowing the jury "impermissibly [to] infer that [the defendant] is a bad man likely to have committed the crime for which he is being tried." United States v. Benedetto, supra, No. 77-1306 (2d Cir. February 24, 1978), slip op. at 1739.^{16/}

^{15/} Compare United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971) (admission of other crimes evidence upheld when government did not overemphasize misdeeds and no other evidence of fraudulent or criminal conduct admitted). See also Advisory Committee Notes to Rules 403 and 404(b), Fed. Rules Evid. (in deciding whether to exclude evidence court should consider availability of other means of proof).

^{16/} Since it cannot be said with "fair assurance" that the jury was "not substantially swayed" by this evidence in reaching a verdict, its admission was not harmless error. See Kotteakos v. United States, 328 U.S. 750, 765 (1946).

B. The Trial Court Violated Rule
609(b) Fed. R. Evid., by Allowing
the Government to Use Convictions
More Than Ten Years Old for
Impeachment

Appellant Mahler's argument with respect to the use of his prior convictions for impeachment is straightforward: Rule 609(b) prohibits the introduction for impeachment of convictions more than ten years old unless the government sustains the burden of convincing the court, and the "court determines in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Since the record in this case gives no indication that the trial judge ever made the determination required by the rule, Mr. Mahler's conviction should be reversed. In a trial in which the defendant's credibility was an important issue, the introduction of this impeachment evidence, in clear violation of the requirement of Rule 609, cannot be considered harmless.

Instead of meeting this argument, the government attempts to divert this Court's attention with novel, but inaccurate, statements of the facts and the law. There is nothing to the government's opening statement -- "Whatever objections Mahler had to the introduction of his prior convictions were waived once Mahler took the stand."^{17/} There is no such doctrine of law. The government must be confused with the rule that a

^{17/} Government's Brief at 37.

defendant who chooses to take the stand and risk impeachment by prior convictions waives his right to remain silent under the Fifth Amendment. The case referred to by the government in its footnote simply does not support the government's assertion, by analogy or otherwise.^{18/}

The government also suggests that Mr. Mahler may be "equitably estopped from claiming that the ten-year limit expired on his convictions."^{19/} The government's novel suggestion follows its factually incorrect assertion that the "expiration [of the ten year period] was the result of Mahler's various requests for continuances."^{20/} A glance at the docket entries shows that the mistrial was declared on May 26, 1977, and that the case was not even assigned to Judge Pollack for retrial until June 22, 1977.^{21/} The ten year period of Rule 609(b) expired on June 18, 1977.^{22/} Any requests for continuances made by Mr. Mahler had absolutely no effect on the expiration of the ten year period.

^{18/} The government cites United States v. Vario, 484 F.2d 1052, 1054-55 (2d Cir. 1973), cert. denied, 414 U.S. 1129 (1974), which merely holds that a defendant who explains a prior conviction on direct examinations waives the right to challenge the accuracy of docket entries introduced by the government to establish the conviction.

^{19/} Government's Brief at 40 n. *.

^{20/} Ibid.

^{21/} The pertinent docket entries may be found on page A. 4 of Appellant Mahler's Appendix.

^{22/} See Brief of Appellant Mahler at 37 n. 56, Government's Brief at 38 n. **.

The government admonishes Mr. Mahler for failing to bring Rule 609 to the trial court's attention at the time the government actually impeached him through cross-examination about the convictions.^{23/} But Rule 609(b) clearly contemplates a contest and determination concerning the use of such evidence in advance of its actual introduction.^{24/} Mr. Mahler had already made his objections under Rule 609 and they had been summarily overruled.^{25/}

The government also asserts, incorrectly, that Mr. Mahler exploited his convictions for his own purposes in his opening statement and at trial, and insinuates that he therefore waived any error in their admission for impeachment.^{26/} It refers to United States v. Mariani, 539 F.2d 915 (2d Cir. 1976), a case holding only that one who objects to a pretrial ruling that a conviction may be introduced, but then introduces the conviction himself in order to explain it in its most favorable light, waives his objection to the pretrial ruling if the evidence forms no significant part of his opponent's case.^{27/} The isolated references to the convictions in the defendant's opening

^{23/} Government's Brief at 45.

^{24/} Rule 609(b) states that "evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

^{25/} See Brief of Appellant Mahler at 37 and n. 57.

^{26/} See Government's Brief at 45.

^{27/} 539 F.2d at 921. The trial court specifically stated that there had been no waiver, noting that the evidence regarding prior convictions was coming in over defense objections (Tr. II 665-666).

statement and case at trial^{28/} were made only after the government had already used the convictions in its opening statement^{29/} and in its direct case.^{30/} The holding of the Mariani case is inapplicable here, for this is a case in which the references to the convictions by the objector were to diminish the effect of evidence "already admitted over his objection." See United States v. Mariani, supra, 539 F.2d at 921.

The government tries to reduce Mr. Mahler's argument to "an attack on the form of the ruling " (emphasis the government's).^{31/} Our argument is not based on the form of the trial court's ruling. It is based on the fact that the court failed to state the specific facts and circumstances it relied on, as well as on the fact that the record reveals nothing to show the trial court ever made the determination required under Rule 609(b).^{32/}

^{28/} See Government's Brief at 45 nn. * and **.

^{29/} See Tr. II 16, 20.

^{30/} See Tr. II 741-764 [A. 123-147]. See also Tr. II 147, 152, 270.

^{31/} Government's Brief at 43.

^{32/} The government speculates that the Congress "undoubtedly" believed the advance presentation of the considerations involved under Rule 609(b) by the litigants to the trial Court made an expression by the trial court of the "specific facts and circumstances" on which he rested his decision "functionally unnecessary" (Government's Brief at 43-44 n. **). This would be completely inconsistent with the previously expressed Congressional intent that "The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial effect" (See Brief of Appellant Mahler at 38 and n. 58). Such findings are necessary for proper appellate review.

(footnote continued on page 13)

The government points out that the trial court twice denied Mr. Mahler's motions to preclude the use of the convictions for impeachment.^{33/} But neither of the court's terse rulings indicate that the Rule 609(b) determination was made.^{34/} This is not a case in which the record shows that the court concluded "the probative value of the conviction . . . substantially outweighs its prejudicial effect" but simply failed to articulate the grounds for his ruling.^{35/}

The government seeks to rely on Judge Frankel's ruling at the first trial as the basis for the court's ruling at the second trial.^{36/} Although the government seeks to convince this Court that Judge Frankel had, as an alternative ruling, held that he would permit impeachment by the prior convictions under Rule 609(b) even if they were over ten years old, the fact is that Judge Frankel never so ruled. As we pointed out in our opening

^{32/} (continued from page 12)

Although the government points to cases decided under Rule 609(b) to support its position that the court need not articulate the reasons for its conclusion, Rule 609(a) lacks the requirement contained in Rule 609(b) that the conclusion be "supported by specific facts and circumstances."

^{33/} Government's Brief at 40. See R. Docs. 71 and 83.

^{34/} See *id.*

^{35/} See Government's Briefs at 44. The government in its brief articulates grounds that could have supported the trial court's rulings, but this fails to show that the trial court actually made the determination required under Rule 609(b). See Government's Brief at 41-43.

^{36/} See Government's Brief at 39, 42-43.

brief,^{37/} Judge Frankel ruled that because the convictions at that time were less than ten years old, he had no discretion to exclude them. See Rule 609(a)(2). He went on to rule only that even if he had discretion to exclude convictions of this nature which were less than ten years old, he would not exclude them in this case.^{38/} That Judge Frankel never made the Rule 609(b) determination is made clearer by focusing on the discretionary standard he was discussing -- "that the prejudice from this particular conviction will outweigh its relevance so that it should be excluded."^{39/} This is the Rule 403 standard. The Rule 609(b) standard requires a different determination -- "that the probative value of the conviction . . . substantially outweighs its prejudicial effect" (emphasis added).

The absence of any indication in the record that Judge Pollack ever complied with Rule 609(b) and concluded that the probative worth of the impeachment evidence "substantially outweighs its prejudicial effect" requires reversal.

^{37/} Brief of Appellant Mahler at 27 n. 38.

^{38/} See United States v. Smith, 551 F.2d 348, 358 n. 20 (relating Judge Friendly's question whether Rule 403 grants a court discretion to exclude convictions otherwise admissible under Rule 609(a)). That this was the extent of Judge Frankel's ruling is clarified by a reading of the legal argument concerning the issue before the first trial. See March 23, 1977 Tr. at 10-18.

^{39/} See Government's Brief at 39.

II. THE PARTIALITY OF THE TRIAL COURT AND ITS ACTIONS CAST SUCH SERIOUS DOUBT ON THE FAIRNESS OF THE TRIAL THAT THE CONVICTIONS MUST BE REVERSED

We had hoped that the government would respond dispassionately to this sensitive issue. Obviously, it is not one we lightly raised. Instead, the government has chosen to accuse appellant and his counsel of having improper motives (Government's Brief at 46, 51, 54, 69) and of making an "ad hominen [sic] attack" on the trial court (Government's Brief at 71). Suffice it to say that the merits of appellant's arguments are for this Court to decide and the intemperate and conclusory allegations of the government can offer this Court no assistance in its task.

The government at the outset demonstrates its confusion about the issue actually before the Court. It begins its argument by insisting that even if the actions of the trial court complained of by appellant Mahler involved erroneous rulings, the matters complained of were not significant and thus "substantial rights" were not affected (Government's Brief at 46-47). But appellant has not, of course, raised evidentiary questions. The question is whether the court's conduct of the trial violated the rule that the judge must never "give the jury the impression of partisanship or the impression that he believes one version of the evidence and disbelieves or doubts another." United States v. Grunberger, 431 F.2d 1062, 1067 (2d Cir. 1970); United States v. Guglielmini, 384 F.2d 602, 605 (2d Cir. 1967); United States v. DeSisto, 289 F.2d 833, 834 (2d Cir. 1961).

In addition, the government demonstrates confusion regarding many of the facts. For example, the government insists that after the superseding indictment was filed, appellant had a "full week" before trial within which to file motions (Government's Brief at 48, 50). However, retrial was scheduled to begin on October 3, 1977, and was continued on a daily basis (because the trial court was engaged in another trial) on October 3, 4 and 5 (see Oct. 3, 1977 Tr. 2; Oct. 4, 1977 Tr. 2). On October 5, appellant Mahler was arraigned on the superseding indictment (Oct. 6, 1977 Tr. 9) and trial on the superseding indictment was set for the next day, Thursday, October 6, 1977 (see Oct. 6, 1977 Tr. 2). On October 6, 1977, the trial court once again continued the trial, this time until Tuesday, October 11, 1977, the date the trial actually commenced (October 6, 1977 Tr. 2). On October 8, 1977, the trial court reaffirmed its oral ruling of October 6, 1977 (Oct. 6, 1977 Tr. 10-11) and denied appellant Mahler's written request for leave to file motions (see A. 51-56).

Moreover, the government makes numerous assertions that it does not -- and indeed cannot -- support with references to the record. Thus, it claims that appellant Mahler changed attorneys approximately ten different times (Government's Brief at 49); that many of the trial court's sua sponte interventions were in fact responses to government counsel's rising to make an objection (Government's Brief at 58, footnote); and that the testimony of the key defense witness, Charles Hecht, "consumed no more than two hours" (Government's Brief at 59).

The government seeks to place great emphasis on the fact that trial counsel for appellant Mahler did not make specific objections to each intervention of the trial court (e.g., Government's Brief at 46, 56). To begin with, this ignores the impossible position counsel for appellant Mahler faced. As one commentator has noted:

[Courts] have usually been ready to dispense with the requirement of objection when judicial misconduct is at issue. An objection to a trial judge concerning his own conduct is of course very likely to be fruitless; in addition, challenging the behavior of a dictatorial judge may merely antagonize him further.^{40/}

Moreover, refusal of the trial court in this case to permit bench conferences exacerbated the problem by requiring any such challenges to be in open court, in the presence of the jury (see Brief of Appellant Mahler at 46).^{41/} Thus, as this Court has noted in a similar context, "it is understandable that a defense counsel may wish to avoid underscoring a prejudicial remark in the minds of the jury by drawing attention to it." United States

^{40/} Albert W. Alschuler, "Courtroom Misconduct By Prosecutors and Trial Judges," 50 Tex. L. Rev. 629, 687-688 (1972) (footnote omitted) [hereinafter referred to as "Alschuler"]. Professor Alschuler's article was based on a report he prepared for the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York. Id. at 629, footnote.

^{41/} Commenting on "the delicacy of the lawyer's position," Professor Alschuler notes that one prominent New York defense attorney has found that the best way "to surmount the difficulties involved in raising objection to judicial misconduct" is to immediately have a bench conference. Alschuler, note 40, supra, at 688 and n. 234.

v. Grunberger, 431 F.2d 1062, 1069 (2d Cir. 1970).^{42/} Finally, even after counsel for appellant Mahler made detailed and specific objections to the trial court's intervention (Tr. II 1236-1238, 1241-1244) [A. 217-219, 220-223], the trial court continued to intervene (e.g., Tr. II 1405, 1409, 1411, 1435, 1445-1446, 1458, 1472, 1473, 1495) [A. 224, 225, 226, 230, 231-232, 233, 234, 235, 236].

As to the specific instances of improper intervention referred to in our opening brief, we see little point in repeating each of them by reference to the denials contained in the government's brief. This difference of opinion will be resolved by the Court. However, there are two instances discussed in the government's brief that we believe require particular attention.

(1) The testimony of Charles J. Hecht

The government seeks to justify the trial court's constant intervention on behalf of the government during the testimony of the first defense witness, Charles J. Hecht, by asserting that the interventions were proper and that, indeed, the

^{42/} The government contends that appellant Mahler's brief does not cite "a single specific example of how he was prejudiced" by the trial court's requirement that objections -- in "short form" -- had always to be made in open court (Government's Brief at 53). Aside from the type of prejudice discussed above, this awkward procedure created other difficulties and prejudice for appellant at trial, and appellant Mahler cited numerous instances in the record, all of which support that claim. E.g., see Tr. II 126, 462-464, 494-496, 949-950, 1453-1458 (see Brief of Appellant Mahler at 46). See also Court's Exhibit 4 (Appendix of the United States at 45).

opportunity to adduce Hecht's testimony at all was a "benefice" [sic] extended by the trial court to which appellant was not entitled (e.g., Government's Brief at 58-59). This assertion is, with all due respect, totally unfounded.

To begin with, much of Mr. Hecht's testimony, far from being allowed as an act of grace by the trial court, was a result of a specific request made by the trial court to counsel for either side to provide the jury with explanatory testimony regarding "shell deals," "the marketing of stock" and the "sophisticated securities" matters involved in the trial -- none of which the trial court felt the jury understood (Tr. II 811-812).^{43/} As we pointed out in our opening brief, the government offered no such testimony in its case (Brief of Appellant Mahler at 60 n. 78). The government has not contended otherwise in its brief. And plainly, Mr. Hecht was well qualified to testify regarding these matters (Tr. II 1169-1171).^{44/}

^{43/} The full text of the court's remarks are included in the Brief of Appellant Mahler at 60 n. 78. See also Tr. II 1243 [A. 222].

^{44/} In addition to providing the jury with the very type of explanation that the trial court had requested, Hecht's testimony served other plainly legitimate purposes. For example, it served to rebut the impression created in the government's case that "shell deals" were per se improper and illegal means to circumvent SEC rules and regulations. Thus, for example, Hecht testified regarding legitimate business reasons for a private company and a public "shell" to merge (e.g. Tr. II 1178-1181). Plainly this was appropriate testimony for the defense case and to have denied appellant the opportunity to present it would have denied him the right to present the defense theory of the case. Hecht also testified regarding appellant Mahler's modus operandi as contrasted with that of Mr. Zucker, a crucial issue on the question of appellant Mahler's intent and central to appellant Mahler's theory of the case. Hecht also testified regarding the bias of Zucker, who was a government witness against Mahler (Tr. II 1195-1197).

Furthermore, while the government now contends that the trial court's interventions were necessary to correct Hecht's "erroneous legal opinions" (Government's Brief at 61) or "misleading or erroneous statements" (Government's Brief at 61, footnote), it never identifies any such "legal opinions" or states why any of Hecht's testimony was "erroneous" or "misleading."^{45/} Indeed, the government ignores the fact that the trial court's intervention for the prosecution began before Hecht had testified regarding any of the matters the court had asked explication for. Thus, on the first page of the transcript of Hecht's testimony the trial court rudely interrupted the witness as he was recounting his background (Tr. II 1169-1170) [A. 188-189] and shortly thereafter interrupted again in an effort to discredit the witness before he even began by attempting to show that he had a conflict of interest (Tr. II 1173-1175) [A. 190-192].^{46/} As this Court's own examination of the record will demonstrate, the trial court's interventions had nothing at all to do with correcting "erroneous" or "misleading" "legal opinions." The record in fact reveals that the trial court had "assumed the prosecutor's role." United States v. Nazzaro, 472 F.2d 302, 308 (2d Cir. 1971).

^{45/} The government also makes the extreme assertion that Hecht's conduct in answering questions was "bordering on contempt" (Government's Brief at 61). There is absolutely no support in the record for its assertion. Even in criticizing the manner of Hecht's testimony, the trial court did not believe there was anything "advertent" in it. (Tr. II 1243) [A. 222].

^{46/} See Brief of Appellant Mahler at 54-55.

At any rate, the motivation behind the trial court's interruptions and interventions were not nearly so important as the frequency and manner which he did so; and in this case his actions during Hecht's testimony -- particularly when contrasted with his actions during the prosecution's case -- amounted to "the display of a fixed opinion as to the guilt of [the] accused limit[ing] the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he." United States v. Brandt, 196 F.2d 653, 656 (2d Cir. 1952).^{47/}

(2) Jury Instructions

In an attempt to deflect this Court's attention from the failure of the trial court even to consider appellant Mahler's requests to charge, the government throws up a smoke screen of asserted errors by appellant in the presentation of his requests and preservation of his rights on appeal.

Thus, for example, the government repeatedly insinuates

^{47/} The government seeks to minimize the damage done the defense by the trial court by asserting that Hecht "was a decidedly minor" witness (Government's Brief at 59). Even if this statement were true, it does not focus on the question at issue here -- whether the trial court's conduct indicated to the jury that it favored or believed one side over the other. At any rate, the government's assertion is simply not accurate. Hecht was the first witness and his testimony was central to presentation of the defense theory of the case (see n. 44, supra). We reiterate our belief that he was probably the most important witness for the defense (Brief of Appellant Mahler at 17, 54); absent the trial court's constant intervention for the prosecution, Hecht's testimony would not have been received by the jury with the skepticism it would apply to the testimony of any defendant.

that appellant Mahler's requests to charge were not timely filed (Government's Brief at 63, 65, 66). The record makes short-shrift of this insinuation. On Friday, October 21, 1977, the trial court noted: "I should tell counsel that the deadline for the submission of request to charge is Monday morning so that I may have an adequate opportunity to prepare a charge for the jury" (Tr. II 1236) [A. 217]. On Monday morning, October 24, 1977, as the first order of business, appellant Mahler submitted to the trial court his requests to charge (Tr. II 1241) [A. 220].

Similarly without merit is the government's assertion that appellant Mahler's requests were not submitted in any "recognizable, or usable fashion" (Government's Brief at 63). The instructions requested by Mr. Mahler (Court Exhibit 9) [R. Doc. 97] were, as noted on the cover page, "those given by the Honorable Marvin E. Frankel in the trial of the superceded indictment, 76 Cr. 1047, with Defendant Mahler's additions, deletions and revisions noted on the transcript of those proceedings."^{48/} Moreover, a detailed index noted the page on which each requested instruction could be found. Id.^{49/} We do not understand how the government can contend that this differs in any substantial or

^{48/} Those additions, deletions and revisions were not substantial. This form of submission permitted the trial court to ascertain easily the precise changes made to the charge given by Judge Frankel at the first trial.

^{49/} Thus, to use the words of the government in its argument regarding the admission of appellant Mahler's prior convictions, "Judge Pollack had before him the prior ruling . . . of another experienced trial judge" (Government's Brief at 42).

significant respect from requests to charge with the title of each request at the top of the pages. Certainly this could not be the basis for the rejection in toto of a defendant's requested jury instructions.^{50/}

The government also complains that appellant Mahler did not object before the charge was given to the requests made by the government (e.g. Government's Brief at 66, 68). We could with equal force point out that the government noted no objections to the requested instructions submitted by appellant Mahler. More importantly, while counsel for appellant Mahler was, on the morning the charge was to be given, prepared to do so, they were given no such opportunity. The trial court did not inform counsel for the defense that their requests had each been denied nor did it invite argument concerning jury instructions -- it simply called the jury in and began the charge (Tr. II 1711) [A. 237]. See Rule 30, Federal Rules of Criminal Procedure.^{51/}

^{50/} We note in this respect that the court was well-aware that trial counsel for appellant Mahler had been retained at the last minute by appellant's family, arriving in New York City on Sunday, October 9, 1977 (two days before trial (Tr. II 89-91)); that they entered their appearance on the morning of trial; and that they had no secretarial staff at their disposal (Oct. 11, 1977 Tr. 2, 5, 11). Indeed, the trial court noted that "I am appreciative of the fact that you [counsel for defendant Mahler] have come up here on short order and have participated very fairly and efficiently in the progress of the case" (Tr. II 91).

^{51/} The government also contends that "an opportunity for argument was effectively given to Mahler's counsel on the afternoon prior to the charge (when nothing remained but to charge the jury) but Mahler's counsel failed to avail himself of it" (Government's Brief at 67, footnote). There is absolutely no support in the record for this statement. On the contrary, the record shows (footnote continued on page 24)

The government goes on to make what is, in the circumstances of this case, an extraordinary claim: they argue that, when finally given an opportunity to do so, counsel for appellant Mahler did not make specific objections to the court's charge (Government's Brief at 67-70) but undertook a "charade" and objected in only "the most contrived sense" (Government's Brief at 69 and first footnote). It is hard to imagine how the government can seriously urge that the objections of counsel for appellant Mahler, covering some twelve pages of the transcript (Tr. II 1789-1801) [A. 315-327] and made notwithstanding the trial court's direction during the course of those objections to "[m]ove along rapidly" (Tr. II 1794) [A. 320], were not detailed or specific. Apparently they base this meritless claim on the ground that the objections made by defense counsel were made by reference to the numbered requests in the government's proposed charge, rather than "by specific references to the words or substance of the Court's own charge" (Government's Brief at 69).

To begin with, a comparison of the government's requests to charge (Court Exhibit 10) [R. Doc. 97] -- made a part of the

51/ (continued from page 23)

that the afternoon session began that day at 2:10 p.m. with resumption of appellant Ubben's direct examination (Tr. II 1576). After Ubben's direct and cross-examination were completed (Tr. II 1625), a recess was taken before final arguments began (Tr. II 1625). Counsel for appellant Ubben estimated his argument would be 45 minutes long; counsel for appellant Mahler estimated his argument at one hour; the prosecutor estimated 45 minutes on closing and an additional 30 minutes for rebuttal (Tr. II 1626). All closing and rebuttal arguments were given before recess at the end of the day (Tr. II 1627-1703).

record at the request of appellant Mahler's trial counsel (Tr. II 1799, 1801-1802) [A. 325, 327-328] -- with the trial court's instructions as given shows that they are "the words or substance of the Court's own charge," given with few changes and in the same order as the government's requests. Compare Court Exhibit 10 [R. Doc. 97] with Tr. II 1711-1789 [A. 237-315]. Moreover since the trial court quite obviously read its instructions from its copy of the government's requests to charge (see Tr. II 1792-1793, 1799) [A. 318-319, 325] the manner of counsel's objection was the most specific and efficient and the best calculated way to direct the trial court's attention to exactly which portions of the charge were being objected to. In essence, counsel directed the trial court to the very pages of its own instructions on which alleged error was committed.^{52/} And contrary to the intimations of the government and the statements of the trial court, those objections were made not on the basis of what the government proposed but rather on the basis of what the trial court actually said.^{53/}

^{52/} As this Court has recognized, the rationale behind Rule 30 of the Federal Rules of Criminal Procedure is to "afford the district court an opportunity to correct any possible error." United States v. Pelose, 538 F.2d 41, 43 (2d Cir. 1976).

^{53/} For example, during trial counsel's exceptions, the following colloquy took place:

MR. JANIS [counsel for Mr. Mahler]: Pages 6 and 7 before the (a), (b), (c) and so forth. The Court omitted to state -- the last paragraph -- the last sentence of the top paragraph says: "I instruct you, however, that this exemption under Rule 133 was not applicable to any shares held by Mahler and Ubben if (footnote continued on page 26)

Finally, the government seeks to explain away the trial court's failure even to consider appellant Mahler's requests to charge by making the bizarre argument that no requests had ever been submitted (Government's Brief at 67). Thus, claims the government, when counsel for appellant Mahler began to note his exceptions to the trial court's charge, the trial court's comment that "I have had no request from the defendant Mahler at any time" (Tr. II 1790) [A. 316], actually was "an allusion, as everyone present understood, to the fact that he had

53/ (footnote continued from page 25)

any of the following conditions were present." We object because the Court did not also add "If they were present and the defendants were aware of them."

THE COURT: You are not quoting my charge at all. You are quoting the requests.

MR. JANIS: I followed the charge along, your Honor.

THE COURT: But the charge was not what you have just stated on the record. Go ahead.

MR. JANIS: That is my recollection. If I am wrong, I apologize.

THE COURT: I am not interested in your apology. It is perfectly plain to me what you are telling me now are these prepared objections on requests to charge received ten days ago which you are uttering now and misstating what I charged.

MR. JANIS: If I am misstating it, I apologize to the Court.

THE COURT: I am not saying that in any wrong sense. I am saying you didn't pay any attention to what was being charged. You were just reading the requests. (Tr. II 1797-1798) [A. 323-324.]

In fact, a comparison with the trial court's actual instruction reveals that trial counsel for Mr. Mahler quoted the trial court's charge virtually verbatim (Tr. II 1764) [A. 290].

In the only other instance when the trial court insisted that the objection of counsel for appellant Mahler was based upon the government's proposal rather than the trial court's actual charge (Tr. II 1792-1793) [A. 318-319], the trial court was once again incorrect (Tr. II 1728) [A. 254].

rejected the packet submitted by Mahler as not being a proper request to charge" (Government's Brief at 67). That assertion is totally inaccurate, and is nothing more than wishful thinking on the government's part. As an examination of the colloquy makes abundantly clear,^{54/} the government's position is not only unsupported by the record, but it is inconsistent with both common sense and the English language.

In fact, the government has really not answered appellant Mahler's contentions. Predictably, the government has suggested throughout its brief that any error committed at the trial was harmless because of the purported weight of its evidence. Of course, we deny that the government's evidence was weighty. But even if one were to assume arguendo that it was, a criminal defendant is entitled to "a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested." United States v. Brandt, supra, 196 F.2d at 655-656; see United States v. Nazzaro, supra, 472 F.2d at 312. Moreover, as Professor Alschuler has noted:

[C]ourts have demonstrated their extreme reluctance to hold courtroom misconduct by trial judges nonprejudicial. The courts, moreover, have been particularly reluctant to apply the harmless error doctrine simply because evidence of guilt seemed overwhelming. The Fifth Circuit said in 1932, "It

^{54/} The full colloquy is quoted on pages 64-65 of the Brief of Appellant Mahler.

is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted."55/

As we noted in our opening brief, we respectfully submit that, taken together, the actions of the trial court "cast such a serious doubt on the fairness of the trial that the convictions must be reversed." United States v. Guglielmini, supra, 384 F.2d at 607. See United States v. Grunberger, supra, 431 F.2d at 1064; United States v. DeSisto, supra, 289 F.2d at 834; United States v. Brandt, supra, 196 F.2d at 655.

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed.

Respectfully submitted,

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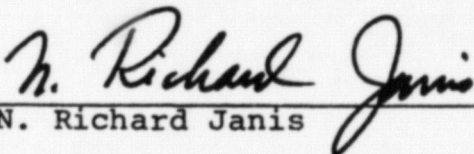
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55/ Alschuler, note 40, supra, at 690 (footnotes omitted).

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief for Appellant Arnold Nelson Mahler were mailed by prepaid first class postage on the 29th day of April, 1978, to counsel for Appellant Dean H. Ubben, David Blackstone, Esq., 401 Broadway, New York, NY 10013, and that two copies of the Reply Brief were personally delivered on the 1st day of May, 1978, to the office of counsel for the government, Jed. S. Rakoff, Esq., Assistant United States Attorney, One St. Andrews Plaza, New York, NY 10007.


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